No. 87-920

In The

Supreme Court of the United States

October Term, 1987

NATALIE MEYER, in her official capacity as Colorado Secretary of State, and DUANE WOODARD, in his official capacity as Colorado Attorney General,

Appellants,

v.

PAUL K. GRANT, EDWARD HOSKINS, NANCY P. BIGBEE, LORI A. MASSIE, RALPH R. HARRISON, and COLORADANS FOR FREE ENTERPRISE, INC., a Colorado corporation,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF COLORADO, AND THE AMERICAN CIVIL LIBERTIES UNION OF THE NATIONAL CAPITAL AREA AS AMICI CURIAE IN SUPPORT OF APPELLEES

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QUESTION PRESENTED

Whether Colorado's complete ban on any form of compensation for circulation of initiative petitions unconstitutionally restricts advocates' and petition circulators' right of free political expression guaranteed by the First and Fourteenth Amendments.

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INTEREST OF THE AMICI CURIAE

The American Civil Liberties Union is a nationwide, nonpartisan organization of more than 250,000 members dedicated to protecting and preserving civil rights and civil liberties guaranteed by law. The American Civil Liberties Union Foundation of Colorado and the American

Civil Liberties Union of the National Capital Area are affiliates of the American Civil Liberties Union.[1]

Since its creation over sixty years ago, the American Civil Liberties Union, with its affiliates, has worked to promote and ensure the constitutional operation of state and federal electoral systems. *Amici* are particularly concerned about governmental burdens on the electoral process and have participated, both as parties and as *amici*, in numerous cases challenging such burdens.[2]

The Colorado statute at issue here, which prohibits the proponents of an initiative measure from compensating petition circulators for their efforts to qualify the measure for a general election ballot, is intended in part to mute the voices of certain initiative proponents and to restrict the types of initiatives that are presented to voters on the ballot. *Amici* submit that such a restriction is invalid under the First and Fourteenth Amendments and that the decision below of the United States Court of Appeals for the Tenth Circuit is correct. Because this Court's decision will have a direct effect on matters of great importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.

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[1] Pursuant to Rule 36.2 of the Rules of the Court, the parties have consented to the filing of this brief. Letters of consent from their counsel have been filed with the Clerk of the Court.

[2] The American Civil Liberties Union of the National Capital Area recently participated as an *amicus* in *Ficker v. Montgomery County Board of Elections*, 670 F. Supp. 618 (D. Md. 1985), which invalidated a provision similar to the statute at issue here.

STATEMENT OF THE CASE

Since 1910, the Colorado Constitution has reserved to the citizens of Colorado the right to enact legislation directly through the initiative process. Colo. Const. art. V, § 1. At least five percent of voters, measured by the total number of votes cast in the previous election for Secretary of State, must sign a petition to qualify an initiative measure for the general election ballot. *Id.* Under Colorado law, the state legislature may enact procedural regulations and measures to prevent fraud in the initiative process, but these must "further the purpose" of the process rather than curtail it. *Colorado Project-Common Cause v. Anderson*, 178 Colo. 1, 5, 495 P.2d 220, 221-22 (1972).[3]

[3] *Amici* wish to alert the Court that there may be adequate and independent state-law grounds for invalidating the statute. In article V, § 1 of the Colorado Constitution, the right of initiative is "expressly declared to be self-executing, and as such, only legislation which will further the purpose of the constitutional provision or facilitate its operation, is permitted." *Anderson*, 178 Colo. at 5, 495 P.2d at 221-22. The Colorado Supreme Court has therefore held invalid legislation that "directly or indirectly limits, curtails or destroys" the right to the initiative. *Id.* at 5, 495 P.2d at 222. While the Colorado Supreme Court has not addressed the specific issue presented here, it has permitted only legislation that regulates the voting process or prevents fraud. *See, e.g., Baker v. Bosworth*, 122 Colo. 356, 363, 222 P.2d 416, 419 (1950).

Amici recognize that the Court does not normally consider issues of state law not raised below, but note the state law issue because the Court may wish for prudential reasons to remand the case for consideration of the question, *see Neese v. Southern Railway Co.*, 350 U.S. 77, 78 (1955), or perhaps certify the question to the Colorado Supreme Court. *See Virginia v. American Booksellers Association*, 108 S.Ct. 636, 643-45 (1988); *Elkins v. Moreno*, 435 U.S. 647, 658-62 (sua sponte certification of potentially dispositive state-law question); Colorado Appellate Rule 21.1 (certification procedure).

In 1941, the Colorado legislature enacted a statute that prohibits payment for the circulation of initiative petitions. Colo. Rev. Stat. § 1-40-110 (1980 Repl. Vol.) (hereinafter "the statute"). Colorado is one of only three states which impose any restriction on payment of petition circulators. Def. Ex. E, J.A. 71, 99.

In 1984, the statute stymied five individuals and a corporation favoring the deregulation of motor carriers in their effort to qualify a deregulation initiative proposal for the general election ballot. J.A. 19-20. The corporation, Coloradans for Free Enterprise, Inc., was founded in 1982 "to promote free market solutions" to problems in Colorado. J.A. 12. The individuals included a chemical engineer and a certified public accountant. J.A. 13, 45. The initiative proponents filed the instant case in the United States District Court for the District of Colorado, seeking a declaration that the statute violated their rights under the First and Fourteenth Amendments to the United States Constitution, as well as an injunction against its enforcement.

Proponents of the initiative measure testified at trial that they sought support and comment from a "broad-based group of citizens" before drafting the measure, including state legislators and those in the transportation industry. A number of these endorsed the proposal. J.A. 13-15. Support for the petition drive came from limousine companies, small trucking companies, "tiny" cab companies, "potential" business people, and some who had recently been denied licenses by the Colorado Public Utilities Commission. J.A. 25, 42.

The proponents who testified had both circulated petitions themselves and recruited other solicitors, and they described the manner in which petition circulators solicit signatures. The circulator first asks if the potential signer is a registered voter. If so, and if the person is

receptive, the circulator then describes the proposal and engages the voter in a dialogue about the merits of the proposal. The circulator may tailor his argument to individual circumstances or objections, or may simply describe the public benefits of the measure. If he persuades the voter that the proposal deserves to be placed on the ballot, he obtains the voter's signature on a petition form. J.A. 16-17, 30-31, 40-41, 47. Proponents testified that the ban on compensation necessarily diminished the time they could spend soliciting, it also reduced their ability to motivate others to participate in the "painful" solicitation process. J.A. 19, 39-40, 42, 47.

The State's expert witness expressed several concerns about the use of paid circulators in the initiative process —for example, that certain issues were too complex to be submitted directly to the voters, that the Colorado Constitution was "too liberal" with respect to initiatives, and that she found payment to petition circulators "personally distasteful." J.A. 87, 88, 95.

The district court denied relief, on the premise that the statute did not significantly affect First Amendment rights because it limited only the ability of the plaintiffs to pay others to speak and did not otherwise restrict their ability to publicize their beliefs. The district court found the statute analogous to limitations on contributions to candidates, and further considered the asserted state interests compelling. A panel of the Tenth Circuit affirmed, adopting the district court opinion.

On petition for rehearing, the Tenth Circuit *en banc* reversed by a vote of six to two, holding the statute invalid under the First and Fourteenth Amendments. The Court reasoned that the statute limited political speech by restricting independent expenditures in support of ballot measures and found that the State's asserted interests were not compelling under those circumstances.

The Court noted that other measures adequately addressed the State's expressed concerns about fraud and sufficient public support in the initiative process.

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SUMMARY OF ARGUMENT

Colorado's complete prohibition on any form of compensation for the circulation of initiative petitions is a direct restraint on political speech which must be measured by the exacting scrutiny applicable to governmental restrictions on core First Amendment rights.

The statute restricts independent expenditures by initiative proponents to further their advocacy of ballot measures. In a series of opinions over more than a decade, the Court has consistently held that similar restrictions burden core First Amendment rights and are subject to strict scrutiny. None of the arguments advanced by the State justifies the application of any other analysis here.

Contrary to the State's suggestion, the statute directly restricts *appellees'* speech, not the speech of others. Compensation of circulators under the facts of record differs in no material way from a citizen's purchase of an advertisement or payment to a lobbyist. The recipient exercises no independent discretion over whether and how funds will be spent, but is in effect the "mouthpiece" of the payor. Furthermore, the appellees here wish not only to pay, but also to be paid themselves, for petition circulation.

The State's argument that the signature-verifying obligation of petition circulators transforms them into public election officials is not based on relevant authority or legislative findings. The fact that the State, for its own administrative convenience, chooses not to verify petition

signatures by any regular process cannot strip initiative proponents of their First Amendment rights.

Appellants' contention that the statute restricts only conduct and not speech ignores *Buckley v. Valeo*, 424 U.S. 1 (1976), and its progeny, which establish that restrictions on independent campaign expenditures directly regulate speech. Moreover, the record demonstrates that the essential function of the petition circulator is to persuade voters through political speech, and that banning payment for circulators' activities reduces the quantity of speech and debate by reducing the available pool of circulators. By the State's own admission, the statute is designed to mute the speech of the wealthy and preserve the "grassroots" nature of the initiative. Given these goals, the statute is content-based and not a mere "incidental" restriction of speech.

Strict scrutiny is not inappropriate merely because initiative proponents may make expenditures other than for petition circulators. The Court's campaign spending cases hold that regulation need not foreclose all avenues of expression or impose an absolute expenditure ceiling to elicit strict scrutiny.

Neither of the interests the State advances to support the statute is compelling, and the statute therefore cannot withstand strict scrutiny. The first interest—in ensuring that initiative measures placed on the ballot have a minimal level of public support—is adequately served by the Colorado constitutional requirement that a specified number of signatures be obtained before an initiative reaches the ballot. The State's argument that petition circulators must spring spontaneously and voluntarily forward at the outset of the qualification process ignores the fact that the necessary level of public support may be achieved if proponents are free to exercise fully their First Amendment rights of persuasion and debate. The State has no

legitimate interest in curtailing or restricting debate concerning ballot measures.

As for the second interest—in maintaining the "integrity" of the initiative process and preventing the "appearance of corruption"—appellants fail to specify the nature of the State's concerns or how they are served by the statute. The Court has held on several occasions that preventing corruption is not a legitimate concern in campaigns for ballot measures, and there is no evidence here that paid circulators are any more likely to obtain fraudulent signatures than are volunteers. In any event, existing criminal penalties for fraud are entirely adequate to address any legitimate interest in preventing corruption.

ARGUMENT

I. THE COURT MUST APPLY THE EXACTING LEVEL OF SCRUTINY APPROPRIATE TO REGULATION WHICH RESTRICTS POLITICAL EXPRESSION AT THE CORE OF THE FIRST AMENDMENT'S PROTECTION.

The Colorado statute imposes a criminal prohibition on spending money to disseminate political speech. Its sanction "operates at the core of the First Amendment by prohibiting [appellees] from engaging in classically political speech," *Boos v. Barry*, 56 U.S.L.W. 4254, 4256 (U.S. Mar. 22, 1988); the statute must therefore "be subjected to the most exacting scrutiny." *Id.* at 4257.

A. The Statute Prohibits Political Expression at the Core of First Amendment Protection.

Uncontested evidence at trial established that the essential role of the initiative petition circulator is to engage voters in a dialogue about the merits of the proposed

measure, and, if possible, to persuade them that the proposal deserves a place on the general election ballot. J.A. 15-18, 39-41, 48. Given that fact, Colorado's prohibition on the payment of circulators

> operate[s] in an area of the most fundamental First Amendment activities. Discussion of public issues . . . [is] integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expressions in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

Buckley, 424 U.S. at 14 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). *See also Mills v. Alabama*, 384 U.S. 214, 218-19 (1966).

Colorado's defense of the statute rests on a fundamentally mistaken premise: that the State may prohibit expenditures in support of a ballot measure without restricting speech in any constitutionally significant way. It has long been established that speech does not forfeit its constitutional protection because expenditures are involved in its dissemination. *E.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964) (paid advertisement). Directly or indirectly, all of appellants' characterizations of the statute seek to evade this Court's express recognition that "virtually every means of communicating ideas in today's mass society requires the expenditure of money." *Buckley*, 424 U.S. at 19.

In the context of campaign financing, this Court has emphasized time and again that, because of the importance of money in communicating ideas, a restriction on expenditures in a political campaign "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.; accord Federal*

Election Commission v. Massachusetts Citizens for Life, Inc., 107 S. Ct. 616, 624 (1986); *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480, 493-94 (1985) (hereinafter "*NCPAC*") ("the expenditures in this case produce speech at the core of the First Amendment"). As the Tenth Circuit noted in its opinion below, "[t]he clear import of the decisions of the Supreme Court is that restraints on political association and communication, imposed by restrictions on financing of campaigns for ballot measures, are suspect and subject to strict scrutiny." *Grant v. Meyer*, 828 F.2d 1446, 1452 (10th Cir. 1987) (en banc).

Because soliciting signatures is arduous and time-consuming, the pool of available volunteers may be inadequate to qualify an initiative measure for the ballot within prescribed time limits. Even measures with broad popular support may fail to qualify if proponents are prevented from enlisting additional advocates by providing compensation to circulators. Prohibiting such expenditures "impedes the sponsor's opportunity to advance his political views . . . ; it curtails the discussion of issues that normally accompanies the circulation of petitions; and it restricts the size of the audience that can be reached." *Ficker v. Montgomery County Board of Elections*, 670 F. Supp. 618, 620 (D. Md. 1985). Such a limitation "directly and inevitably restricts 'the amount of money a person or group can spend on political communication during a campaign.'" *Hardie v. Fong Eu*, 18 Cal. 3d 371, 376-77, 134 Cal. Rptr. 201, 203, 556 P.2d 301, 303 (1976), *cert. denied*, 430 U.S. 969 (1977) (quoting *Buckley*, 424 U.S. at 19).

In its brief, the State emphasizes that the initiative is intended to ensure the individual citizen's right to affect the political process. The State fails to recognize, however, that spending money on petition circulators has the same function: such expenditures express

"political preferences," and thereby constitute participation "in the free discussion of governmental affairs." BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 Calif. L. Rev. 1045, 1053 (1985). Even more clearly than the indirect limit on expenditures to support or oppose ballot measures struck down in *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), Colorado's statutory prohibition of payments to petition circulators operates "as a direct restraint on freedom of expression of [those] desiring to engage in political dialogue concerning a ballot measure." *Id.* at 299.[4]

B. Compensation of Circulators Does Not Constitute "Speech by Proxy."

Appellants seize upon language in *California Medical Association v. Federal Election Commission*, 453 U.S. 182 (1981), to argue that appellees' own First Amendment rights are not restricted because they seek to employ others to speak for them. Brief for Appellants at 15. The

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[4] Appellants' argument that the State can limit the "right" to the initiative because the State created that right is based on an erroneous premise. *See* Brief for Appellants at 14. The initiative in Colorado is not a right that the State created and granted to the people; rather, it is a right that the people of Colorado have reserved to themselves. Colo. Const. art. V, § 1. The State's argument is also flawed in its reliance on *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328 (1986). *Posadas* involved commercial speech. This case, by contrast, involves "[d]iscussion of public issues" and "political expression," to which the First Amendment "affords the broadest protection." *Buckley*, 424 U.S. at 14. *See also Boos v. Barry*, 56 U.S.L.W. 4254, 4256 (U.S. Mar. 22, 1988) ("We have recognized that the First Amendment reflects a 'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open,' and have consistently commented on the central importance of protecting speech on public issues") (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

discussion of "speech by proxy" in that case has no application to the circumstances here.

Writing for a plurality of the Court in *California Medical Association*, Justice Marshall explained *Buckley's* distinction between independent expenditures and contributions to candidates or candidate committees. *California Medical Association* involved a limitation on the amount of contributions by an unincorporated association to a "multi-candidate political committee" under federal campaign finance law.

Buckley emphasized that the First Amendment interests of a contributor to a candidate's campaign are more attenuated than those involved in independent expenditures on behalf of the same candidate, because the recipient of a campaign contribution retains complete discretion to determine how the funds will be spent. 424 U.S. at 20-21. *Buckley* viewed a contribution as a "general expression of support for the candidate and his views," an "undifferentiated, symbolic act" which provided "a very rough index of the intensity of the contributor's support." *Id.* at 21. "While contributions *may* result in political expression . . ., the transformation of contributions into political debate involves speech by someone other than the contributor." *Id.* (emphasis added). In *California Medical Association*, Justice Marshall described this relationship, in which a contributor delivers funds to a candidate or candidate committee with no restriction on what will be done with the money, as "speech by proxy." 453 U.S. at 196-97.

No similar considerations apply to this case. No candidates or candidate committees are involved. Just as in the paradigm case of independent expenditures to purchase advertising in the public media, appellees seek to compensate "surrogates," to use the State's own term, to "advocate their positions to the public." Brief for Appellants at 15. Hiring college students to carry the message to registered voters differs in no principled way from other forms of direct expenditures for advertising. *See* J.A. 47. Such a surrogate functions as a "mouthpiece" to transmit and amplify the specific political message of the person who pays him. *See California Medical Association*, 453 U.S. at 196.

Moreover, some appellees testified that *they themselves* would be free to devote more time to advocacy and solicitation for the initiative measure if they could be compensated for their efforts. J.A. 19, 38-39. Others testified that they could use their time more efficiently by spending money earned through their own employment to hire spokesmen, perhaps more skilled at public interaction and persuasion, perhaps with more time available to engage in solicitation. J.A. 46-47. ***In neither case does the recipient exercise independent discretion with respect to how the funds are to be expended,*** as is the case in contributions to a candidate or candidate committee.

Where, as here, proponents of a ballot measure themselves choose the means by which their message will be disseminated, and that choice grants no discretion to another in deciding how to expend funds, the speech-by-proxy doctrine is inapplicable and the choice is protected by the First Amendment. *See The Supreme Court 1984 Term—Leading Cases*, 99 Harv. L. Rev. 120, 228 (1985) ("In *NCPAC*, as in *Berkeley*, the Court accurately perceived that individuals who contribute modest sums of money to PACs are selecting a means of broadcasting their views, and that the first amendment protects this choice as fully as it protects the decision to make a direct independent expenditure.").[5]

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[5] Without reference to the record or citation of authority, the State contends that "this case does not involve many small contributors who want to add their voices to the message."

(Continued on following page)

C. Petition Circulators and Proponents Do Not Surrender Their First Amendment Rights by Verifying Signatures.

Appellants suggest that the simple requirement that those who gather petition signatures sign an affidavit attesting to the validity of the signatures somehow strips petition circulators and proponents of their First Amendment rights. *See* Brief for Appellants at 12. But the State's failure to provide any mechanism for independent signature verification hardly converts the circulator into a neutral government official.[6] That contention was rejected by both the majority and the dissenters below. *Grant v. Meyer*, 828 F.2d 1446, 1453 n.10, 1460 n.2 (10th Cir. 1987) (en banc). Circulators are more nearly analogous to lobbyists, whose activities are clearly protected by the First Amendment. *See Regan v. Taxation With Representation*, 461 U.S. 540, 552 (1983) (Blackmun, J., concurring).

Appellants' reliance on *Branti v. Finkel*, 445 U.S. 507, 517-18 (1980), is misplaced. The suggestion in *Branti* that a policy-making state employee might be replaced

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Brief for Appellants at 15 n.4. In fact, the record suggests that associational rights may well be implicated by the State's ban on paid petition circulators; Lori Massie, a fundraiser for the corporate appellee, testified that with a ban on paid solicitors, it was not worth her while to spend the limited time available raising funds rather than seeking volunteers. J.A. 43. A ban on expenditures may adversely affect the collective right of initiative proponents to pool their funds to engage full-time advocates and thereby to amplify their voices. Such collective action is "entitled to full First Amendment protection." *NCPAC*, 470 U.S. at 495. *See City of Berkeley*, 454 U.S. at 296.

[6] Those who sign petitions represent by their signatures that they are qualified electors, and are subject to criminal sanctions if they sign improperly. Colo. Rev. Stat. § 1-40-118 (1980 Repl. Vol.). Under the State's theory, do they also become government officials and waive First Amendment rights?

after a change of administrations, based on his political affiliation, cannot be extended to a holding that initiative proponents may be deprived of their rights to political expression and association merely because the State chooses not to verify signatures independently. *See Elrod v. Burns*, 427 U.S. 347, 360 n.13 (1976) (rejecting contention that public employees waive First Amendment rights by accepting employment). *See also Tashjian v. Republican Party*, 107 S. Ct. 544, 551 (1986) (state may not restrain party's freedom of association for reasons of its own administrative convenience).[7]

The Court has recognized that restricting payment to solicitors burdens First Amendment rights even where the subject of the solicitation is charitable rather than political. *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947 (1984); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) (striking as overbroad a city ordinance denying permits to charitable solicitors with high administrative costs). Where the solicitation is for support of a public ballot issue, and the regulation bans *all* payment to solicitors, it is idle to suggest that the statute "regulates the conduct of a state function only." Brief for Appellants at 11.

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[7] The only legal authority the State cites for the proposition that the petition circulator is "envisioned" as a state official is *Sturdy v. Hall*, 143 S.W.2d 547, 550 (Ark. 1940). Brief for Appellants at 9. That case was not concerned with the constitutional rights of initiative proponents or with the propriety of payment to circulators. In fact, the court noted that the Arkansas constitution forbade any legislative restriction on payment of circulators. *Id.* The court's reference to "election judges" was in the context of a discussion whether petitions containing fraudulent signatures should be invalidated in part or *in toto*.

D. Colorado's Ban on Payment of Circulators Is Not a Reasonable, Incidental Restriction on the Time, Place, or Manner of Speech.

The principle that speech does not lose its protected status because it is associated with compensation is well settled. *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 955 n.6 (1984); *New York Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964). Under *Buckley* and its progeny, the Colorado statute is invalid as a restriction on independent expenditures in support of a ballot measure. To evade that result, appellants argue that the Colorado statute regulates conduct, and that the statute's validity must be judged by the standards set forth in *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984), and *United States v. O'Brien*, 391 U.S. 367 (1968).

1. The Statute Does Not Regulate the Time, Place, or Manner of Speech.

The plain language of the statute does not purport to regulate the "time," the "place," or the "manner" of speech by petition circulators. Under the statute, a "volunteer" circulator is free to buttonhole voters at any time and place, and in any fashion, without encumbrance from the State. The statute only criminalizes the same kind of expression by a speaker who receives compensation. As in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), which struck down a restriction on corporate expenditures for referenda, the prohibition is keyed to the nature of the speaker and therefore clearly implicates First Amendment rights: "In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." *Id.* at 784-85. Although the statute at issue here does not seize upon the corporate form as the basis of discrimination, the effect of the prohibition is similar.

2. Restrictions on Electoral Spending Directly Regulate Speech, Not Merely Conduct.

Appellants' argument amounts to a claim that the First Amendment protects speech but not spending. This Court has consistently rejected that argument in considering restraints on electoral spending. As the Court noted in *Buckley*, 424 U.S. at 16, "We cannot share the view that . . . contribution and expenditure limitations are comparable to the restrictions on conduct upheld in *O'Brien*." The Court has *never* analyzed restrictions on political expenditures as an "incidental" restraint on speech under the rubric of *O'Brien*. *See, e.g., NCPAC*, 470 U.S. at 493 (independent expenditures "produce speech at the core of the First Amendment"); *City of Berkeley*, 454 U.S. at 299 ("limits on expenditures operate as a direct restraint on freedom of expression"). Indeed, political giving is itself a communicative act; it is precisely because spending has communicative significance that the State seeks to regulate it. *See* BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 Calif. L. Rev. 1045, 1058-59 (1985); Brief for Appellants at 17.

Furthermore, the trial record and common knowledge establish that the circulator of a petition engages in political speech as a means of persuading voters to sign the petition. J.A. 15-18, 40-41, 48; *see Ficker v. Montgomery County Board of Elections*, 670 F. Supp. 618, 619-20 (D. Md. 1985); *Hardie v. Fong Eu*, 18 Cal. 3d 371, 376, 134 Cal. Rptr. 201, 203, 556 P.2d 301, 303 (1976), *cert. denied*, 430 U.S. 969 (1977). Indeed, the district court opinion in this case (adopted by the majority of the Tenth Circuit panel) acknowledged appellees' testimony that "it is often necessary to educate and argue with potential petition signers to convince them the issue is one which should be considered by the general electorate." *Grant v. Meyer*, 741 F.2d 1210, 1212 (10th Cir. 1984), *vacated*, 828 F.2d

1446 (10th Cir. 1987) (en banc). That the restricted activity involves money as well as speech does not make the *O'Brien* test applicable. "[T]his Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a non-speech element or to reduce the exacting scrutiny required by the First Amendment." *Buckley*, 424 U.S. at 16 (citations omitted). *See also Sullivan*, 376 U.S. at 165-66.

3. Vincent Is Inapplicable.

Members of City Council v. Vincent, 466 U.S. 789 (1984), did not displace the consistent line of analysis this Court has applied from *Buckley* to *Massachusetts Citizens for Life*. *Vincent* dealt with a city's right to control the use of its own property, not with electoral spending limitations. The statute at issue here cannot be viewed as "unrelated" to the suppression of speech, as was the anti-litter ordinance in *Vincent*. 466 U.S. at 805. Rather, Colorado's ban on paid solicitors imposes a preference for "voluntary" speech by criminalizing the political speech of compensated circulators.

While the statute does not in terms single out any specific point of view for sanction, the State itself proclaims that the statute preserves the "grassroots nature" of the initiative, Brief for Appellants at 7, and protects against the "undue influence of wealth." *Id.* at 17. Quite apart from the question whether these asserted interests are legitimate at all, *see* Section IIA *infra*, the State's claims are a frank admission that the purpose of the statute is to favor certain kinds of speakers over others. *See also* BeVier, *supra*, 73 Calif. L. Rev. at 1062 (campaign finance legislation deprives the wealthy of the advantage of their position and is not neutral in impact). The State's own description of the statute demonstrates that it is content-based, and thus that the *O'Brien-Vincent* analysis is inapplicable. *See Boos v. Barry*, 56 U.S.L.W.

4254, 4256-57 (U.S. Mar. 22, 1988) (regulation not content-neutral although government itself not selecting between specific views). Here, the State has determined that an entire category of speech—that presented by paid circulators—is not to be presented.

4. The Availability of "Other Avenues" Does Not Justify the Statute's Restriction of Political Speech.

Appellants' emphasis on the availability of "other avenues" of expression, aside from payment of petition circulators, is misplaced. In *Berkeley*, for example, individuals were free to make unlimited expenditures in support of (or in opposition to) ballot measures, yet the Court invalidated a specific limitation on individual contributions to political committees.

Appellees' testimony at trial established that direct compensation to petition circulators is the most effective dollar-for-dollar expenditure of a proponent's funds. *See, e.g.*, J.A. 41. To a group or an individual with modest funding, like appellees here, an invitation to spend unlimited amounts on media advertising is cold comfort. *See Buckley*, 424 U.S. at 19 n.18 ("Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gas").[8]

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[8] It is ironic, if not perverse, that a statute aimed at protecting the "grassroots nature" of the initiative and insuring a "significant modicum" of support penalizes the only effective method available to those of limited means to gain that support, while leaving those with large institutional war-chests free to spend any amount necessary to achieve the desired result through more expensive indirect media advertising and the use of "volunteer" employees as circulators. *See* J.A. 26 (testimony of Paul Grant concerning methods used by supermarket chains to circulate petitions for initiative measure to permit wine sales in grocery stores).

A statute need not close all avenues of expression, or impose a ceiling on expenditures, to invoke strict scrutiny. In *Massachusetts Citizens for Life,* for example, the Federal Election Campaign Act imposed no expenditure limit on a corporation seeking to spend money in connection with an election. The Act did establish burdensome organizational, solicitation, and reporting requirements, however, which "impose[d] administrative costs that many small entities may be unable to bear." 107 S. Ct. at 626. Small incorporated groups formed to disseminate political ideas "might well be turned away" from their advocacy by such requirements, the Court noted, "limiting the ability of such organizations to engage in core political speech." *Id.* Although the Act did not "remove all opportunities for independent spending . . . , the avenue it leaves open is more burdensome than the one it forecloses. The fact that the statute's practical effect may be to discourage protected speech is sufficient to characterize [it] as an infringement on First Amendment activities." *Id.*

II. THE ASSERTED STATE INTERESTS CANNOT SURVIVE STRICT SCRUTINY.

Because the statute "burdens First Amendment rights, it must be justified by a compelling state interest." *Federal Election Commission v. Massachusetts Citizens for Life, Inc.,* 107 S. Ct. 616, 627 (1986). *See also Boos v. Barry,* 56 U.S.L.W. 4254, 4257 (U.S. Mar. 22, 1988) (content-based restrictions on First Amendment rights subject to "the most exacting scrutiny"). Colorado advances two interests to support its ban on payments to petition circulators: (1) an interest in ensuring that initiative measures have a significant modicum of public support, and (2) an interest in protecting the integrity of the initiative process. Neither interest, however, "satisf[ies] the exacting scrutiny applicable to limitations on

core First Amendment rights of political expression." *Buckley,* 424 U.S. at 44-45. And both interests could be satisfied by less restrictive means.

A. The Statute Does Not Legitimately Advance the State's Asserted Interest in Ensuring a Modicum of Support for Initiative Measures.

The State argues that, to ensure that an initiative measure "has a significant modicum of support and that the signatures on the petition reflect actual support rather than the influence of a few, powerful special interests," the number of people circulating petitions must bear some proportion to the proposed initiative's general support among the electorate at large. Brief for Appellants at 16-18. An initiative measure has a modicum of public support, the argument goes, only if petition circulators are spontaneous volunteers; if money is used to hire additional petition circulators, then the ratio of circulators to supporters in the electorate will be "skewed." *Id.* at 17.

This "pro rata" approach to the significant modicum requirement posits that the only measures which belong on the ballot are those which enjoy a broad base of public support *before petitions are circulated and before proponents have had a chance to marshal public support.*[9] But whatever interest the State may have in ensuring that only initiative measures with broad public support reach the ballot, the State has no legitimate interest in restricting initiative proponents in their efforts to *generate* that support through political advocacy. *Hardie v. Fong Eu,* 18 Cal. 3d 371, 378, 134 Cal. Rptr. 201, 204, 556 P.2d 301, 303 (1976), *cert. denied,* 430 U.S. 969 (1977). *See NAACP v. Button,* 371 U.S. 415, 445 (1963)

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[9] The State's argument, if accepted, would also justify any other limitations on expenditures at this juncture, such as restrictions on paid advertising.

("the Constitution protects expression and association without regard to the . . . popularity . . . of the ideas and beliefs which are offered").

The State's argument ignores the fact that if full political debate and expression are allowed, an initiative proposal may acquire the required modicum of public support, *i.e.*, the specified number of valid petition signatures needed to reach the election ballot. The Colorado Constitution requires that, for an initiative to reach the ballot, petitions be signed by "at least five percent of the total number of votes cast for all candidates for the office of secretary of state at the previous general election." Colo. Const. art. V, sec. 1. In this case, that requirement mandated that appellees obtain 46,737 signatures. *Grant v. Meyer,* 828 F.2d 1446, 1448 (10th Cir. 1987) (en banc). The signature requirement by itself therefore satisfies the State's asserted interest in ensuring that only initiative measures with "enough underlying support" appear on the ballot. Brief for Appellants at 18.

The State's real interest is in restricting the voices of those who can afford to pay petition circulators. *See* Brief for Appellants at 17. "But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley,* 424 U.S. at 48-49. The State cannot "assume the task of ultimate judgment" and "restrict what the people may hear." *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 791 n.31 (1978). "[T]here is no significant state or public interest in curtailing debate and discussion of a ballot measure." *Citizens Against Rent Control v. City of Berkeley,* 454 U.S. 290, 299 (1981).

Underlying the State's argument is a concern that if proponents of an initiative measure can pay petition circulators, they will succeed in persuading more voters to

sign petitions. This Court rejected such a concern in *Bellotti.* Here, as in *Bellotti,* paid advocacy "may influence the outcome of the vote; this would be its purpose." *Id.* at 790. "But the fact that advocacy may persuade the electorate is hardly a reason to suppress it . . . . [T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments." *Id.* at 791. *Accord Brown v. Hartlage,* 456 U.S. 45, 60 (1982) ("[t]he State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech").

In any event, the State's asserted interest in "removing the undue influence of wealth from the [initiative] process" is completely misplaced under the facts of this case. Brief for Appellants at 17. A more "grassroots" group than appellees cannot be imagined. The individual appellees are citizens taking time out from their private lives and, in most instances, from their regular jobs to promote public awareness of governmental issues. J.A. 25. The sole corporate appellee, Coloradans for Free Enterprise, Inc., was founded "to promote free market solutions to problems here in the State of Colorado." J.A. 12. The facts suggest no "potential for unfair deployment of wealth for political purposes." *Massachusetts Citizens for Life,* 107 S. Ct. at 628 (restrictions invalid as applied to non-stock, non-business corporation organized to engage in political speech).

B. The State's Asserted Interest in Protecting the Integrity of the Initiative Process Cannot Justify the Statute.

The State contends that prohibiting payment to petition circulators serves a compelling interest in protecting the integrity of the initiative process and in avoid-

ing the appearance of corruption. Brief for Appellants at 18.

This Court has recognized on several occasions that the risk of corruption perceived in candidate elections "simply is not present in a popular vote on a public issue." *Bellotti,* 435 U.S. at 790. *Accord City of Berkeley,* 454 U.S. at 297-98. Accordingly, the Court has recognized a compelling governmental interest in avoiding corruption or the appearance of corruption only when contributions to a *candidate* are at issue, *Buckley,* 424 U.S. at 26-27, and not when expenditures on *ballot measures* are restricted. *City of Berkeley,* 454 U.S. at 297.

Moreover, here, as in *Bellotti,* the State's concern is unsupported "by record or legislative findings that [the advocacy at issue] threatened imminently to undermine democratic processes." *Bellotti,* 435 U.S. at 789. *See generally City of Berkeley,* 454 U.S. at 299 (record did not support conclusion that limitation on contributions to ballot measure committees "is needed to preserve voters' confidence in the ballot measure process"). Perhaps that is why the State does not articulate its interest in avoiding the appearance of corruption with any specificity.[10] In fact, both the majority and the dissent below agreed that there is no reason to believe that "unpaid volunteers are somehow more trustworthy and dependable than paid solicitors." *Grant v. Meyer,* 828 F.2d at 1460 n.2 (Logan, J., dissenting); *see id.* at 1454 (majority opinion).

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[10] Appellants proffer only abstract legal arguments and historical generalities. The only "facts" appellants discuss are statistics which the State claims demonstrate that ballot initiatives are relatively commonplace in Colorado. These statistics, however, say nothing about the number of initiatives which never reach the ballot because of the effect of the statute. More importantly, the State's figures are irrelevant in considering whether its asserted interests are compelling.

State regulation of speech must be narrowly tailored to address the State's specific concerns and avoid unnecessary restriction of First Amendment rights. *Boos v. Barry,* 56 U.S.L.W. 4254, 4257, 4259 (U.S. Mar. 22, 1988). Colorado has enacted specific provisions to prevent fraudulent conduct in the solicitation of signatures that address the State's corruption concerns. *See* Colo. Rev. Stat. §§ 1-40-106, 1-40-107, 1-40-109, 1-40-118, 1-40-119 (1980 Repl. Vol. & Supp. 1987). These provisions can be, and have been, enforced by the Colorado Secretary of State, *see, e.g., Case v. Morrison,* 118 Colo. 517, 197 P.2d 621 (1948); *Brownlow v. Wunsch,* 103 Colo. 120, 83 P.2d 775 (1938), and are adequate to address any State concern that petition signatures might be obtained fraudulently. *See Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 637-38 (1980); *Dunn v. Blumstein,* 405 U.S. 330 (1972).

CONCLUSION

Because the statute restricts political speech and is not narrowly drawn to achieve a compelling governmental interest, *amici* urge that the judgment of the United States Court of Appeals for the Tenth Circuit be affirmed.

Respectfully submitted,

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